IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

CRL.A.No. 1704 of 2003(C)

SC.531/2000 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD

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APPELLANT: ACCUSED

K.APPAYYA MANIYANI
S/O. KRISHNA MANIYANI PRASAD HOTEL, MOUVAR,
KUMBADAJE VILLAGE, KASARAGOD DISTRICT.

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MUHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1704 of 2003

Dated this the 10th April, 2007.

J U D G M E N T

The accused in S.C.No.531/2000, on the file of the Additional Sessions Court, (Ad hoc-I), Kasargod, is the appellant. He was found guilty of the offence punishable under Section 55(a) of the Abkari Act, in short 'the Act', and, therefore, was convicted and sentenced to undergo rigorous imprisonment for a period of 3 ½ years, and also to pay a fine of Rupees One Lakh, in default, to undergo rigorous imprisonment for a period of six months. The same is under challenge through this appeal.

2. The prosecution case in brief is that, on getting information, PW.3, the then Sub Inspector of Police, Badiaduka Police Station, along with police personnel, went near a culvert, at Badiaduka-Mulleria public road, Kumbadaje Village. They have found the appellant, and on search, it was found that the appellant was in possession of 70 bottles of Boss Whisky, each bottle containing 375 ml. capacity. The total quantity thus comes to 26.25 litres. Ext.P1

seizure mahazar was prepared by PW.3, attested by PW.1. Ext.P2 is the scene mahazar drawn out by PW.3, and attested by PW.2. PW.3 completed the investigation and filed the final report against the appellant.

3. To prove the offence, three witnesses have been examined, and five documents marked. Ext.P5 is the chemical analysis report, which reveal that six bottles, each containing 200 ml., labelled as 'Indian made Foreign Liquor', of Crime No.18/2000, of Badiaduka Police Station, were sent as samples for analysis. The report submitted by the chemical examiner reveal that the samples contained Ethyl Alcohol, varying from 41.65 to 41.92 percentage by volume.

4. The learned counsel appearing for the appellant submitted that the appellant was only in possession of Indian made Foreign Liquor, and, therefore, he was not importing, exporting, transporting or possessing the liquor, during the course of transit. Hence, the offence under Section 55(a) of the Act is inapplicable. Counsel, therefore, emphasised that the offence that may fall can at best be under Section 58 of the Act. Counsel relied on **Surendran v.**

Excise Inspector (2004 (1) KLT 404), **Purushan v. State of Kerala** (2002 (2) KLT 661), and **Mohanan v. State of Kerala** (2007 (1) KLT 845), to emphasise his arguments.

5. In Surendran's case cited above, the petitioner therein was in possession of 15 litres of 'Arrack' kept in his stationery shop. The Division Bench held as follows:-

> "Thus, it appears that the case shall fall within the ambit of S.55(a) only when a person is found to be in possession of liquor in the course of import, export, transport or transit of the goods. In case the possession is merely with the knowledge of the goods having been illegally imported or manufactured, the case would fall within the mischief of S.58."

The Division Bench also upheld the views expressed in Rajeevan v. Excise Inspector (1991 (1) KLT 38), and Purushan's case cited above.

6. As discussed above, 15 litres of arrack was kept in a plastic container in the stationery shop of the petitioner. Therefore, it was rightly held that the petitioner was not importing or exporting,

nor was he in possession of the same, during the process of transit. Hence, it was rightly held that the offence did not fall under Section 55 (a) of the Act.

7. In Mohanan's case cited above, relying on the evidence of DW.1, a permanent tapper, the Court came to the conclusion that the accused therein was a substitute tapper, in an attached licensed toddy shop, who tapped the licensed trees. He was doing the work only in lieu of DW.1. Therefore, the court found that Sections 55(a) and (i) of the Act are not applicable, and instead, the punishment could be imposed was under Section 63 of the Act. In Purushan's case cited above, the conclusion arrived at by the learned Single Judge that only when a liquor is possessed during the imports, exports, transport, or in the transit, Section 55(a) can be attracted. The possession of liquor, in the other circumstances, will not come within the ambit of Section 55(a) of the Act.

8. I respectfully agree with the above prepositions of law, laid down by the Court, in the above cases. The facts of the case and discussion reveal that the appellant was in possession of 26.25 litres of Indian made Foreign Liquor, which was to be used within the

region of Karnataka only. Therefore, it is for him to show that he did not import, export or transport, and was not in the process of transit of the commodity. No evidence has been adduced by the appellant. In Surendran's case cited above, the Division Bench found that neither the trial court nor the lower appellate court had considered that the petitioner therein had the knowledge that the liquor he possessed was illicit. Accepting the contention of the counsel for the petitioner that there was not even a suggestion by the prosecution that the revision petitioner therein was aware of the fact that the recovered material was illegally imported or manufactured, and the duty etc. had not been paid, as contemplated under the Act. Therefore, the Court found that even Section 58 of the Act was not specified.

9. In the case at hand, the facts are different. It was the liquor to be exclusively used within the Karnataka region. The appellant did not adduce any evidence that he was unaware of the fact that it was to be used in Karnataka region. It is for the appellant to prove, how he came into possession of the liquor, which was exclusively to be used within the Karnataka region. He was possessing the liquor to be used in Karnataka region. Therefore, it show that he

had imported, transported and was in possession during transit, the liquor seized from his possession. Therefore, all the authorities narrated above are inapplicable to him. Purchase of liquor from Beverages Corporation or holding Indian made Foreign Liquor, to be used or sold within the State, ought to have made the situation different. In the present circumstances, I am of the view that the arguments advanced by the learned counsel for the appellant cannot be accepted, in the light of the clear legal principles laid down by this Court, on different occasions, as discussed above. Hence, I hold that the prosecution had proved the offence under Section 55(a) of the Act. Therefore, I uphold the conviction entered into by the court below.

10. At this stage, the learned counsel for the appellant submitted that the sentence of 3 ½ years and the fine of Rupees One Lakh is excessive, and, therefore, prayed for reducing the same.

11. The appellant was in possession of 26.25 litres of Indian made Foreign Liquor. He possessed it for the sale of the same. The possession was unauthorised. He was not entitled to sell also. However, in the circumstances of this case, considering the facts that are being urged by the counsel for the appellant, I reduce the sentence

from rigorous imprisonment for 3 ½ years to rigorous imprisonment for one year. The fine of Rupees One Lakh is sustained. The default sentence of six months is also sustained, but the imprisonment shall be simple in nature. The set off is allowed as per the law.

The Criminal Appeal is partly allowed as above.

J.M. JAMES,
JUDGE

nj.